90-862

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROBERT M. WAINWRIGHT,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONER,
ROBERT M. WAINWRIGHT

QUESTIONS PRESENTED FOR REVIEW

I. Whether or not, if the state law of Louisiana has provided two rules for the application of a statutory employer tort immunity defense, one for private employers and one for governmental employers, the rule applicable to private employers must be utilized when the United States is sued pursuant to the Federal Tort Claims Act, 28 USCA 1346(b), 2674.

II. Whether or not, in concluding that the United States should be treated as Louisiana law would treat a governmental employer for purposes of granting a statutory employer tort defense, the United States Court of Appeals for the Fifth Circuit has rendered a decision in

conflict with prior opinions of this court.

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JURISDICTION

This matter was originally decided on January 30, 1990, pursuant to a Motion for Summary Judgment granted in favor of respondent, the United States, by the United States District Court for the Western District of Louisiana, Alexandria Division. It was then appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court on September 5, 1990. A Petition for Rehearing En Banc was timely filed, and, treating the Petition as a suggestion for panel rehearing, denied on October 2, 1990. Jurisidiction in this Honorable Court lies pursuant to 28 USC 1254.

STATUTORY PROVISIONS INVOLVED

This is an action which involves Title 28 USC Sections 1346(b), 2674 (the Federal Tort

Claims Act), and Louisiana Statutes Annotated, Title 23, Sections 1032 and 1061. The pertinent texts are set forth in the Appendix.

STATEMENT OF THE CASE

This action arises out of a personal injury claim filed on behalf of petitioner against respondent, the United States, pursuant to the Federal Tort Claims Act, 28 USC 1346(b), 2674 (hereinafter, FTCA). The evidence shows that in 1985 the United States, acting through the Veterans Administration, entered into a contract with Westerchil Construction Company to build a nursing home facility on the grounds of the Veterans Administration Hospital located in Pineville, Louisiana. Westerchil subsequently entered into a sub-contract with Moreno's, Inc., as an indepen-

dent sub-contractor, to do that part of the work called for in the general contract requiring the installation of chilled water piping.

Petitioner was employed by Moreno's as a laborer and on November 19, 1986, he was injured when a nine foot deep trench in which he was working collapsed, resulting in massive injuries to his left leg and permanent disability.

The contract involved called for the United States to oversee the work and to insure that all applicable safety rules were followed. The United States retained authority to take whatever action was necessary, including suspension of the work, until all requested corrective action was taken. A resident engineer was present on the job site on behalf of the United States at all times.

The trench in which petitioner was injured was unstable and was neither sloped nor shored. Before the accident occurred there had been several instances of the trench caving in and the United States' resident engineer was aware of this and also aware that petitioner's employer had ignored several prior warnings not to have their men work in the trench until it was made safe. Nevertheless, no stop work order or other corrective measures were taken until after petitioner was injured.

Alleging that the United States had violated its duty to provide a safe place to work and to properly oversee the safety of the work site under Louisiana law, plaintiff subsequently filed suit pursuant to the FTCA. The United States answered petitioner's suit and alleged that under Louisiana law, which

must be applied by virtue of the FTCA, it was the petitioner's "statutory employer" and was therefore immune from suit in tort.

Louisiana's statutory employer provisions are set out in LSA-R.S. 23:1032 and 23:1061. Section 1032 provides in substance that if an employee is entitled to receive worker's compensation that shall be his exclusive remedy against his employer or any "principal". Section 1061 provides that a principal is any person who contracts with any other person to perform work which is part of the principal's "trade, business or occupation. . .". The Section further provides that principals are liable for worker's compensation to injured employees of contractors even though they need not actually pay compensation unless the immediate employer of the injured employee does not.

Thus, under Louisiana law a principal who is liable for worker's compensation is immune from suits in tort by employees of injured sub-contractors, even though it never actually pays compensation, provided that the work contracted for is part of the "trade, business or occupation" of the principal. Conversely, if the work contracted for is not part of the principal's trade, business or occupation, then he is not liable for compensation to injured employees of sub-contractors but is potentially liable in tort, provided fault can be shown.

On October 4, 1989, the United States filed a Motion for Summary Judgment on this issue, claiming that it was the statutory employer of petitioner under the Louisiana statutes and therefore entitled to judgment in its favor as a matter of law. On January 30,

1990, the United States District Court issued its ruling, finding in favor of the United States. In so doing, the District Court held that the Louisiana jurisprudence had developed two methods for determining who qualifies as a statutory employer, one for private employers and one for governmental entities. Applying the latter test, the Court determined that the construction of the nursing home was part of the trade, business or occupation of the United States and they were therefore entitled to immunity. (Appendix, page 8a.).

This ruling was appealed to the United States Fifth Circuit Court of Appeals where petitioner urged that under the terms of the FTCA and the prior jurisprudence of this court the proper test to be applied in determining the liability of the United States was that

applicable to private persons, not municipalities or other governmental entities.

On September 5, 1990, in an unpublished per curiam opinion, the Fifth Circuit affirmed the District Court's ruling by merely adopting its reasons. (Appendix, page 12a.) A timely Motion for Rehearing was denied on October 2, 1990.

ARGUMENT

The subject of what does and what does not constitute the "trade, business or occupation" of a principal has been the subject of much litigation in Louisiana's courts. In its reasons for judgment, the District Court in this matter stated:

> "Under Louisiana jurisprudence, two methods have evolved for determining who qualifies as a statutory employer. When the

> private employer is not a governmental entity, courts apply the three-part test explained in Berry vs. Holston Wells Services, Inc., 488 So2d 934 (La. 1986). 1 However, when the employer is a governmental entity, the stringent definition of a statutory employer employed in Berry is inapplicable, and the court is simply to examine whether the contractor was performing the government's trade, business, or occupation to determine if the government is acting as a statutory employer.

1. In brief, under Berry an employer hiring an independent contractor is a "statutory employer" if: (1) the contract work does not require a specialized degree of skill, training and experience; (2) the work is part of the employer's own trade or business; and (3) the employer is engaged in the enterprise at the time of the accident. Berry, 488 So2d at 938-39. See also Mozeke vs. International Paper Company., 856 F2d 722 (5th Cir., 1988)." (Appendix, pages 5-6a.)

It should be noted initially that petitioner has maintained throughout the course of these proceedings that Louisiana does not, and never has, maintained two separate tests for

determining the existence of a statutory employer depending upon whether the party is a private or a governmental entity. Rather, in a series of opinions the Louisiana Supreme Court has evolved a single test definitively pronounced in Berry vs. Holston Well Services, Inc., 488 So2d 934 (La. 1986), cited in Footnote 1 of the District Court's opinion quoted above. Previously, in Klohn vs. Louisiana Power and Light, 406 So2d 577 (La. 1981), the Louisiana Supreme Court had applied what was the then existing universal test for determining statutory employer status to a Louisiana municipality. No mention was made in the opinion of its creating a separate test for governmental entities.

However, in a two sentence per curiam affirmance in 1986, the United States Fifth

Circuit Court of Appeals announced that the Louisiana Supreme Court's opinion in Berry, supra, "does not modify" the Louisiana Supreme Court's rule concerning the "statutory employer status of governmental entities.". Hebert vs. United States, 860 F2d 607 (5th Cir., 1986), at page 608.

To petitioner's knowledge no Louisiana court has ever held that any such separate rule exists. Nevertheless, since the rendition of Hebert the United States Court of Appeals for the Fifth Circuit has acted repeatedly on the assumption that such is the state of Louisiana law. See Leigh vs. National Aeronautics and Space Administration, 860 F2d 652 (5th Cir., 1988); Choline vs. United States, 887 F2d 505 (5th Cir., 1989); Rivera vs. United States Army Corps of Engineers, 891 F2d 567 (5th Cir., 1990). For

purposes of this application, petitioner will assume that these decisions are correct. However, in none of these decisions has the precise issue presented here been addressed, i.e., whether or not, if two tests for determining statutory employer status do exist under Louisiana law, the test applicable to a private employer must be applied to the United States by virtue of the FTCA.

The FTCA provides in 28 USC 2674 in pertinent part as follows:

> "The United States shall be liable, respecting the provisions of this Title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . .". (emphasis added)

Simarily, in 28 USC 1346(b), it is provided:

> ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on and after January 1, 1945 for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (emphasis added)

In a series of three cases this Honorable Court has held that the above statutory authority requires that where the United States is sued under the FTCA and applicable state law provides different rules for establishing tort liability for municipalities or governmental entities and private persons, the rule applicable to private per-

sons must be applied to the United States. Indian Towing Company vs. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955); Rayonier, Inc. vs. United States, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957); and, United States vs. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 6 L.Ed.2nd 1422 (1963).

In Indian Towing Company vs. United States, supra, the plaintiffs brought suit against the United States under the FTCA for damages alleged to have been caused to a ship's cargo by the negligence of the Coast Guard in the operation of a lighthouse. The United States argued that the FTCA should be read as imposing liability on it only if the local law of municipal corporations would impose liability on a state governmental agency. Justice Frankfurter, however, rejected this argument. In so doing he pointed to the

plain language of the statutes indicating that the United States would be liable as if it were a "private person" (1346(b)) and a "private individual" (2674). The Court then held that the test established by the FTCA for determining the United States' liability is simply whether a private person would be responsible for similar negligence under the laws of the state where the act occurred.

Rayonier, Inc. vs. United States, supra, involved an action under the FTCA for losses sustained by plaintiffs allegedly due to the negligence of employees of the government in allowing a forest fire to be started on government land and in failing to act with due care in putting the fire out. The District Court dismissed plaintiffs' complaint and the Court of Appeals affirmed. This Honorable Court reversed the opinions of

the lower courts and, after citing provisions of the FTCA quoted above, the Court held as follows:

> "These provisions, given their plain natural meaning, make the United States liable to petitioners for the Forest Services' negligence in fighting the forest fire if, as alleged in the complaints, Washington law would impose liability on private persons or corporations under similar circumstances.
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> * * * * * *
>
> . . . as we recently held in Indian Towing Company vs. United States, 350 U.S. 61, 76 S.Ct. 122, the test established by the tort claims act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred. We expressly decided in Indian Towing that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the act by resort to an alleged distinction, imported from the law of municipal

> corporations, between the government's negligence when it acts in a "proprietary" capacity and its negligence when it acts in a "uniquely governmental" capacity." 77 S.Ct. 376, 377; 352 U.S. 317, 318.

In United States vs. Muniz, supra, actions were brought by federal prisoners under the Federal Tort Claims Act for injuries sustained while in prison. Applicable state law provided that jailers employed by the state were immune from suits by prisoners. The Court refused to apply this law holding that state rules of governmental immunity notwithstanding, the United States must be judged in the same manner as a private person. The Court stated:

> "Just as we refused to import the 'casuistries of municipal liability for torts' in Indian Towing, so we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity." 83

S.Ct. 1850, 1859; 374 U.S. 150, 166.

The above jurisprudence has been consistently followed by the various federal courts of appeal. See Wright vs. United States, 719 F2d 1032 (9th Cir., 1983); Mandel vs. United States, 719 F2d 963 (8th Cir., 1983); Dimella vs. Graylines of Boston, Inc., 836 F2d 718 (1st Cir., 1988); Raymer vs. United States, 660 F2d 1136 (6th Cir., 1981); and, Schindler vs. United States, 661 F2d 552 (6th Cir., 1981).

Based on the above authority it should be apparent that if Louisiana law provides two rules for determining statutory employer tort immunity - - - one for private individuals and one for governmental entities - - - then the plain language of the FTCA mandates that

when the United States is sued pursuant to that statute the test applicable to private individuals must be utilized. The Fifth Circuit Court of Appeals has failed to do this and has consequently rendered a decision on an important federal question which is in direct conflict with previous opinions of this Court and other federal courts of appeal.

Accordingly, petitioner respectfully submits that this Petition for Writ of Certiorari should be granted and the judgments of the courts below should be reversed, recognizing that the rule of worker's compenstion tort immunity which should be applied to the United States in an FTCA action is that which Louisiana would apply to a private person.

Alternatively, petitioner would urge that, pursuant to Rule 16.1 of the Rules of this

Honorable Court, the writ requested herein be granted and summary disposition be made either on the merits, or by remanding to the United States Court of Appeals for the Fifth Circuit for further consideration.

RESPECTFULLY SUBMITTED:

BROUSSARD, BOLTON,
HALCOMB AND VIZZIER

BY: _____

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ATTORNEYS FOR PETITIONER,
ROBERT M. WAINWRIGHT

C E R T I F I C A T E

I hereby certify that three (3) copies of the above and foregoing Petition for Writ of Certiorari have been sent to Mr. John A. Broadwell, Assistant United States Attorney, Joe D. Waggonner Federal Bldg., 500 Fannin Street, Room 3-B-12, Shreveport, Louisiana 71101, by placing same in the United States Mail, postage prepaid, properly addressed, this 21st day of November, 1990, at Alexandria, Louisiana.

OF COUNSEL

STATE OF LOUISIANA

PARISH OF RAPIDES

Before me, the undersigned authority, personally came and appeared ROY S. HALCOMB, JR., who did depose and state that he is counsel of record for ROBERT M. WAINWRIGHT in this petition for a writ of certiorari to the Supreme Court of the United States and that affiant did on the 21st day of November, 1990, deposit with Federal Express, with postage prepaid and properly addressed to the Clerk of the United States Supreme Court, the foregoing petition for writ of certiorari; and that the aforesaid date was within the time allowed for filing by the United States Supreme Court.

ROY S. HALCOMB, JR.

SWORN TO AND SUBSCRIBED before me, Notary Public, this 21st day of November, 1990.

NOTARY PUBLIC

APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

ROBERT M. WAINWRIGHT

-vs- CIVIL ACTION NO. 88-3044

SECTION"A" (JUDGE LITTLE)

UNITED STATES OF AMERICA

R U L I N G

The plaintiff, Robert M. Wainwright ("Wainwright"), filed this complaint against the United States under the Federal Tort Claims Act, 28 U.S.C. Section 1346(b), 2671 et seq., for damages from injuries sustained while working on a construction project. The United States has moved for summary judgment claiming it was the plaintiff's statutory

employer under the Louisiana Workmen's Compensation Law, La. R.S. 23:1032; 23:1061, and is therefore immune from liability. For the following reasons, the government's motion is GRANTED.

The United States, through the Veterans Administration ("V.A."), contracted with Westerchil Construction Company, as general contractor, to build a nursing home facility on the premises of the V. A. hospital in Pineville, Louisiana. Westerchil contracted with Moreno's, Inc., as an independent sub-contractor, to do certain construction involving the installation of underground piping. Wainwright was employed by Moreno's when he was injured on the job site in November 1986. The injury occurred when the ditch in which the plaintiff was working caved in on him. Wainwright contends his injuries were caused by the negligence of

employees of the United States in failing to provide a safe place to work and failing to take adequate steps to protect workers against the possibility of a cave-in.

The United States, as sovereign, is immune from suit unless it waives its immunity. The government has, under the FTCA, given "a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." United States v. Orleans, 425 U.S. 807, 813, (1976). The FTCA permits recovery in tort against the United States only "under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. Section 1346(b). Under the law of

Louisiana, the principal for whom a contractor is performing work is not liable in tort for negligent injuries suffered by the contractor's employees if the work is part of the principal's "trade, business, or occupation." In those circumstances, the principal, as the "statutory employer" of the injured employees, is liable to them only under the state's workmen's compensation scheme. See Thomas v. Calavar Corp., 679 F.2d 416, 418019 (5th Cir. 1982); Barrios v. Engine & Gas Compressor Servs., 669 F.2d 350, 354 (5th Cir. 1980) (per curiam); Blanchard v. Engine & Gas Compressor Servs., 613 F.2d 65, 68-69 (5th Cir. 1980). This rule applies also to the United States; when it is deemed the statutory employer of a contractor's employees, it gains the same immunity from suit in tort that is enjoyed by employers generally. Roelofs v. United States, 501

F.2d 87, 93 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975).

Under Louisiana jurisprudence, two methods have evolved for determining who qualifies as a statutory employer. When the private employer is not a governmental entity, courts apply the three-part test explained in Berry v. Holston Wells Services, Inc., 448 So.2d 934 (La. 1986).[1] However, when the employer is a governmental entity, the stringent definition of a statutory employer employed in Berry is inapplicable,

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1 In brief, under Berry an employer hiring an independent contractor is a "statutory employer" if: (1) the contract work does not require a specialized degree of skill, training and experience; (2) the work is part of the employer's own trade or business; and (3) the employer is engaged in the enterprise at the time of the accident. Berry, 488 So.2d at 938-39. See also Mozeke v. International Paper Co., 856 F.2d 722 (5th Cir. 1988).

and the court is simply to examine whether the contractor was performing the govern-

ment's trade, business, or occupation to determine if the government is acting as a statutory employer. Chaline v. United States, 887 F.2d 505, 506-07 (5th Cir. 1989); Leigh v. National Aeronautics and Space Admin., 860 F.2d 652, 653 (5th Cir. 1988); Thomas, 679 F.2d at 418-19.

The issue in this case is whether the plaintiff was injured while doing work that is part of the trade, business, or occupation of the United States. Wainwright contends the construction of a nursing home facility is not part of the usual and customary business of the United States. Specifically, Wainwright claims that the V.A. is in the business of providing medical care and services, not the construction business. This argument, however, is without merit.

Title 38, section 201 of the United States Code created the Veterans

Administration as an independent agency within the executive branch of government. The V.A.'s purpose is to administer the laws and other benefits relating to veterans, their dependents and beneficiaries. Title 38 also created general administrative provisions to aid the agency in providing veterans' benefits. 38 U.S.C. Section 3001 et seq. Of particular interest to this case is section 5002 which provides that the Administrator shall provide medical facilities for veterans entitled to hospital, nursing home, or domiciliary care or medical services. That section further gives the Administrator the authority to provide for the construction and acquisition of medical facilities. Section 5001 provides that the term "medical facility" includes nursing homes, and 38 C.F.R. 3.1(z) states that "nursing homes" includes a V.A. Nursing Home

Care Unit. This type of facility was under construction when Wainwright was injured. The V.A. was statutorily empowered to determine the need for such a facility and to enter into a contract with private contractors to fulfill this need. The construction work of the type performed by Wainwright was part of the V.A.'s business of providing medical facilities to veterans. There is no question that Wainwright was injured in the performance of Moreno's subcontract with Westerchil for the construction of the facility. Therefore, the United States was his statutory employer and his exclusive remedy is under the Louisiana Workmen's Compensation Law.

Accordingly, the motion for summary judgment filed by the United States is GRANTED. The complaint filed by the plaintiff, Robert M. Wainwright, is therefore

DISMISSED.

An appropriate judgment will issue.

Alexandria, Louisiana.

_____ January 1990.

_____

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

ROBERT M. WAINWRIGHT

-vs- CIVIL ACTION NO. 88-3044

SECTION"A" (JUDGE LITTLE)

UNITED STATES OF AMERICA

J U D G M E N T

For written reasons this date assigned, the motion for summary judgment filed by the defendant, the United States of America, is GRANTED. The complaint filed by the plaintiff, Robert M. Wainwright, is therefore DISMISSED.

Alexandria, Louisiana.

_____ January 1990.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4099
Summary Calendar

ROBERT M. WAINWRIGHT,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(CV-88-3044)

(September 5, 1990)

Before GEE, SMITH, and WIENER, Circuit Judges.

PER CURIAM:[1]

Plaintiff Robert M. Wainwright suffered severe and disabling injuries to his left

foot, leg, and knee while installing underground piping during the construction of a nursing home care unit at the Veterans Administration ("VA") hospital in Pineville, Louisiana. The United States, through the VA, had retained Westerchil Construction Company to build the nursing home care unit; that company in turn had hired subcontractor Moreno, Inc., Wainwright's employer, to

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1. Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

install underground water pipes for the facility.

Wainwright sued the United States under the Federal Tort Claims Act, alleging that it had been negligent in failing to provide him

with a safe workplace. The United States sought summary judgment on the ground that it was Wasinwright's "statutory employer" under Louisiana law, see La. Rev. Stat. Section 23.1032 and 23:1061, and therefore could not be held liable in tort, Wainwright's sole recourse being the worker's compensation system. The district court granted that motion in a thorough opinion that correctly interpreted and applied the settled law of this circuit. On the basis of that opinion, we AFFIRM.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-4099

Summary Calendar

ROBERT M. WAINWRIGHT,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court

for the Western District of Louisiana

(CV-88-3044)

ON SUGGESTION FOR REHEARING EN BANC

(October 2, 1990)

Before GEE, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Proceduer and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

Title 28 U.S.C. Section 2674

Section 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * *

Title 28 U.S.C. Section 1346

Section 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

* * *

(b) Subject to the provisions of chapter 171 of this title [28 USCS Section 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or

wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

La. R.S. 23:1061

PART I. SCOPE AND OPERATION

SUBPART C. LIABILITY OF PRINCIPAL TO EMPLOYEES OF INDEPENDENT CONTRACTOR

1061. Principal contractors; liability

Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or pro-

ceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor.

La. R.S. 23:1032

Section 1032. Exclusiveness of rights and remedies; employer's liability to prosecution under other laws

The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal, for said injury, or compensable sickness or disease. For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business or occupation in which he was

engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.

Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

The immunity from civil liability provided by this Section shall not extend to: 1) any officer, director, stockholder, partner or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of his employment; and 2) to the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this section.

Amended by Acts 1976, No. 147, Section 1.

(2)

No. 90-862

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT M. WAINWRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
LORI M. BERANEK
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QUESTION PRESENTED

Whether the court of appeals correctly held that the United States was not liable under the Federal Tort Claims Act for injuries suffered by an employee of a subcontractor working on a government facility because, under Louisiana's workers' compensation law, the United States was a "statutory employer" of the injured worker.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-862

ROBERT M. WAINWRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals, Pet. App. 12a-14a, and of the district court, Pet. App. 1a-11a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1990. A petition for rehearing was denied on October 2, 1990. Pet. App. 16a. The petition for a writ of certiorari was filed on November 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, petitioner Robert Wainwright

seeks damages from the United States for injuries that he sustained while working on a construction project at the Veterans Administration (VA) hospital in Pineville, Louisiana. The United States, through the VA, contracted with Westerchil Construction Company to build a nursing home care unit. Westerchil subcontracted with Moreno, Inc.—petitioner's employer—to install underground water pipes for the unit. Petitioner suffered a serious injury when the ditch in which he was working caved in on him. He then brought this suit against the United States for negligent failure to provide a safe workplace and to take adequate steps to protect workers against the possibility of a cave-in. Pet. App. 2a-3a, 12a-13a.

2. The government moved for summary judgment, arguing that under Louisiana's workers' compensation law the United States was Wainwright's "statutory employer" and, consequently, was not liable in tort for his injuries.[1] Pet. App. 1a-2a. The district court granted the motion. It noted that the FTCA permits "recovery in tort against the United States only 'under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" Pet. App. 3a. Under Louisiana law, the court continued, the proper test for determining whether the government qualifies as a statutory employer

[1] Under Louisiana's workers' compensation law, workers' compensation benefits are an injured worker's exclusive remedy against his employer. When a principal contracts with an independent contractor for the performance of work that is part of the principal's business, the principal is—under circumstances discussed further below—deemed an employer of the contractor's employees. La. Rev. Stat. Ann. § 23:1061 (West 1985 & Supp. 1990); see Pet. App. 20a-24a. (As noted below, an amendment to the statute enacted in 1989 is not effective with respect to this case.)

The defense that these provisions afford to a principal is commonly referred to as the "statutory employer defense."

is "whether the contractor was performing the government's trade, business, or occupation." *Id.* at 5a-6a. Although it recognized that in *Berry* v. *Holston Well Service, Inc.*, 488 So. 2d 934 (1986), the Louisiana Supreme Court had developed a more "stringent definition of a statutory employer" for private employers, the court adhered to prior Fifth Circuit decisions holding that the *Berry* test was inapplicable as a matter of state law to governmental entities. Pet. App. 5a-6a (citing *Chaline* v. *United States*, 887 F.2d 505, 506-507 (5th Cir. 1989), cert. denied, 110 S. Ct. 1115 (1990); *Leigh* v. *NASA*, 860 F.2d 652, 653 (5th Cir. 1988); *Thomas* v. *Calavar Corp.*, 679 F.2d 416, 418-419 (5th Cir. 1982)). The district court concluded that "the United States was [petitioner's] statutory employer and his exclusive remedy is under the Louisiana Workmen's Compensation Law." Pet. App. 8a.

3. In an unpublished decision, the court of appeals affirmed, stating that, "in a thorough opinion," the district court had "correctly interpreted and applied the settled law of this circuit." Pet. App. 14a.

ARGUMENT

This is the most recent in a series of cases in which the Fifth Circuit has held that Louisiana's statutory employer defense bars an FTCA action against the United States by an individual injured while working for a government contractor on a government project. See *Giltner* v. *United States*, 894 F.2d 1334 (5th Cir.), cert. denied, 111 S. Ct. 55 (1990); *Chaline*, *supra*; *Leigh*, *supra*; *Hebert* v. *United States*, 860 F.2d 607 (5th Cir. 1986). In each of those cases, the court of appeals has held that the United States' liability should be determined by reference to state-law standards governing the availability of the statutory employer defense to governmental entities. Last Term, in *Giltner*, this Court

denied a petition for certiorari seeking review of the question whether the United States' liability should instead be judged by reference to the standard for private employers. The petition in this case presents the same question. For reasons similar to those we advanced in *Giltner*, further review is unwarranted.

1. Before the Louisiana Supreme Court's decision in *Berry*, a single standard governed the availability of the statutory employer defense to both private and governmental entities in Louisiana. In cases in which an employee of a contractor was injured while working on a public or private project, the issue was whether the worker "was injured while doing work that is part of the 'trade, business, or occupation'" of the principal. *Thomas* v. *Calavar*, 679 F.2d at 419; see *Klohn* v. *Louisiana Power & Light*, 406 So. 2d 577 (La. 1981). However, in *Berry*, a case brought by an injured worker against a private principal, the Supreme Court of Louisiana announced a "three level analysis" governing the availability of the statutory employer defense. 488 So. 2d at 937. The "central question" under *Berry* is "whether the contract work is specialized or non-specialized." *Id.* at 938. If the work is specialized, the statutory employer defense is unavailable to the principal; if the work is not specialized, the availability of the defense depends on whether the contract work "can be considered a part of the principal's trade, business or occupation" and whether the principal "is engaged in the work at the time of the alleged accident." *Id.* at 938-939.

The Fifth Circuit has determined that, as a matter of state law, the *Berry* test does not apply to cases in which the principal is a governmental entity. As the court explained in *Hebert* v. *United States*, 860 F.2d at 608, *Berry* "does not modify the rule of [*Klohn*] or [*Thomas*], which analyze the statutory employer status of government entities." The court

of appeals adhered to that understanding of Louisiana law in this case.[2]

In a recent amendment to Louisiana's workers' compensation law, the Louisiana legislature has overruled *Berry* and effectively restored a single test governing the availability of the "statutory" employer defense to all employers. As amended, the workers' compensation statute now provides, with respect to cases arising after January 1, 1990:

> The fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work.

La. Rev. Stat. Ann. § 23:1061 (West Supp. 1990). This new provision does not apply to petitioner's claim, which arose prior to the amendment's effective date. But this modification of Louisiana's workers' compensation scheme deprives the question presented by the petition of any prospective importance.

2. The Federal Tort Claims Act permits suit against the United States for injuries caused by the negligence of federal

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[2] As petitioner appears to acknowledge, the correctness of the Fifth's Circuit's construction of state law presents no question calling for this Court's review. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."); *Frisby* v. *Schultz*, 487 U.S. 474, 482 (1988) ("Following our normal practice, 'we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.'").

employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b); see 28 U.S.C. 2674 ("United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances"). In several decisions, this Court has made clear that these provisions preclude the federal government from arguing that it is not liable for "uniquely governmental" activities and from invoking governmental immunities conferred by States on state and local governmental entities. *United States* v. *Muniz*, 374 U.S. 150, 159, 164 (1963); *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318-319 (1957); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-68 (1955). In general, "the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred." *Rayonier, Inc*, 352 U.S. at 319; see *Raymer* v. *United States*, 660 F.2d 1136, 1140-1142 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *Ewell* v. *United States*, 776 F.2d 246, 248-249 (10th Cir. 1985). See generally 1 L. Jayson, *Handling Federal Tort Claims* §§ 217.01-217.03 (1989 & Supp. 1990).

Nevertheless, the courts of appeals have sometimes referred to state law rules applicable to state governmental entities to determine the extent of the United States' liability under the FTCA. In *Louie* v. *United States*, 776 F.2d 819 (1985), for instance, the Ninth Circuit concluded that the federal government's liability for an allegedly negligent failure by military police to restrain an intoxicated serviceman "rests properly on an examination of the liability of the state or a municipality under like circumstances." *Id.* at 825; see *Crider* v. *United States*, 885 F.2d 294, 296 (5th Cir. 1989), cert. denied, 110 S. Ct. 2561 (1990) (following

Louie); *Doggett* v. *United States*, 858 F.2d 555, 561 (9th Cir. 1988) (where "unique governmental functions" are involved, court seeks "to determine what liability state law attaches to * * * analogous entities subject to its jurisdiction").[3] The rationale of these decisions appears to be that when a State has exposed governmental entities to suit, a court may properly refer to laws defining the extent of their liabilities for the purpose of determining the scope of the United States' FTCA liability.

In our view, this is not an appropriate case in which to consider the question of when, if ever, a federal court may refer to state-law rules applicable to governmental entities in determining the extent of the United States' liability under the FTCA. Unlike *Indian Towing*, *Rayonier*, and *Muniz*, this is not a case in which the federal government relies on the absence of a similar private function or invokes immunity granted by a State to its governmental entities—limitations on liability that, this Court has determined, Congress meant to relinquish in the Federal Tort Claims Act. Rather, as the Fifth Circuit has read Louisiana law, Louisiana's workers' compensation scheme drew a distinction (from the time of the *Berry* decision until the recent amendment of the statute) between public and private entities with respect to injuries to employees of contractors. Such a distinction could rationally be based on intrinsic differences between the contracting activities of governmental and private entities or on policy considerations regarding the relative merits of the workers' compensation remedy and tort liability in the private and public sectors. The application of the Federal Tort Claims Act in that kind of situation presents a novel question. We are unaware of any deci-

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[3] See generally 1 L. Jayson, *supra*, § 217.02 (collecting cases in which courts have referred to standards governing municipal liability to determine federal government's liability under the FTCA).

sion by courts outside the Fifth Circuit addressing the same or a comparable issue.[4] Moreover, as noted above, Louisiana's recent amendment to its workers' compensation law has mooted the issue as to claims arising after January 1, 1990. Under these circumstances, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] None of the cases cited in the petition, Pet. 20, 24, involved a situation in which the court isolated separate rules for private and governmental entities and chose to apply the latter in determining the United States' liability under the FTCA. Rather, those cases stand for the unexceptional principle that issues of liability and scope of employment must be resolved by reference to state law. See *Mandel* v. *United States*, 719 F.2d 963, 966 (8th Cir. 1983) (United States entitled to same defenses as individuals); *Raymer* v. *United States*, 660 F.2d at 1140-1144 (FTCA covers "uniquely governmental" activities); see also *DiMella* v. *Gray Lines of Boston, Inc.*, 836 F.2d 718, 720 (1st Cir. 1988) (state governmental immunities not available to United States); *Wright* v. *United States*, 719 F.2d 1032, 1034-1035 (9th Cir. 1983) (same); *Schindler* v. *United States*, 661 F.2d 552, 557-560 (6th Cir. 1981) (same).

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